IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1945

Nos. 518, 519 29-30

JOSEPH D. McGOLDRICK, Comptroller of the City of New York, and ALMERINDO PORTFOLIO, Treasurer of the City of New York, Petitioners,

v.

CARTER & WEEKES STEVEDORING COMPANY, Respondent.

JOSEPH D. McGOLDRICK, Comptroller of the City of New York, and ALMERINDO PORTFOLIO, Treasurer of the City of New York, Petitioners,

v.

JOHN T. CLARK & SON, Respondent.

MOTION FOR LEAVE TO FILE and BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF WASHINGTON AS AMICUS CURIAE

January 28, 1946

SMITH TROY,
Attorney General, State of Washington.

JESS N. ROSENBERG,
Assistant Attorney General, State of Washington.

Attorneys for State of Washington.

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Come now Smith Troy, Attorney General for the State of Washington, and Jess N. Rosenberg, an Assistant Attorney General of the State of Washington, and move the court that leave be granted to file Brief of the Attorney General of the State of Washington as Amicus Curiae in the above entitled causes, pursuant to Rule 27 (9) of the Supreme Court of the United States.

SMITH TROY,
Attorney General, State of Washington,

JESS N. ROSENBERG,
Assistant Attorney General, State of Washington,

Attorneys for the State of Washington.

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BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF WASHINGTON AS AMICUS CURIAE

STATEMENT OF THE CASE

The State of Washington has filed its brief as a friend of the court in the cases at bar because its business and occupa on tax (Title II, Revenue Act of 1935, chapter 180, Laws of 1935, as amended, Rem. Rev. Stat. 8370-4 *et seq.*) was the tax under consideration in *Puget Sound*

Stevedoring Co. v. State Tax Commission ('37), 302 U. S. 90, 58 Sup. Ct. 72, modifying 189 Wash. 131, 63 Pac. 2d 532. The court below based its decision solely on the *Puget Sound* case (Petitioners' Brief in support of Petition for Writ of Certiorari to the Supreme Court of the State of New York, herein, p. 12). In the light of these facts the granting of the Petition for Writ of Certiorari in these cases must involve a reconsideration of the *Puget Sound* case. The State of Washington takes the position now, as it did in 1937, that the *Puget Sound* case was improperly decided and should be overruled.

The State of Washington adopts the briefs of Petitioners in the cases at bar.

ARGUMENT

I.

Many cases involving the rights of the several states to measure tax liability by the inclusion in the measure of tax of receipts from the business of engaging directly or indirectly in interstate commerce have been considered by this court since 1937 (Brief of City of New York, *supra*). From these cases the tests to be applied in determining validity will be seen to be:

a. If the imposing state is free to exact the tax, may other states to which the commerce extends lay a tax similarly measured for the privilege of conducting within the respective territorial limits the activities there which contribute to the service? (*Gwin, White & Prince, Inc. v. Henneford et al.* ('39), 305 U. S. 434, 59 Sup. Ct. 325, reversing 193 Wash. 451, 75 Pac. 2d 1017).

b. Does the tax discriminate against interstate commerce by seeking to lay a privilege tax measured by gross receipts derived from activities in such commerce which extend beyond the territorial limits of the taxing state? (*Gwin, White & Prince, Inc. v. Henneford et al., supra*).

c. Does the imposition of the tax subject interstate commerce to the risk of a double tax burden to which intrastate commerce is not exposed? (*J. D. Adams Manufacturing Co. v. Storen et al.* ('38), 304 U. S. 307, 58 Sup. Ct. 913, affirming in part and reversing in part 212 Ind. 343, 7 N. E. 2d 941).

II.

Applying the above tests to the Washington law, which was under consideration in the *Puget Sound* case, a tax on a stevedoring company measured by its receipts from local handling of freight moving in interstate commerce, should be sustained because:

a. No other state to which the commerce extends may lay a similarly measured tax on the stevedoring company, for the privilege of doing a stevedoring business in the State of Washington. It is true that the cost of handling goods moving in interstate commerce may be increased when stevedoring companies in another state, handling the same goods, are required to pay such a tax in the other state, but that is equally true of all local charges and costs of doing business, such as office rental, light and power charges, cost of equipment, labor costs, etc.

> "But it was not the purpose of the commerce clause to relieve those engaged in interstate commerce of their just share of state tax burdens, merely because an incidental or consequential effect of the tax is an increase in the cost of doing the business, *Western Live Stock v. Bureau*, 303 U. S. 250, 254. * * *" (*McGoldrick v. Berwind-White Coal Mining Co.* ('40), 309 U. S. 33, 60 Sup. Ct. 388, reversing 281 N. Y. 610, 670, 22 N. E. 2d 173, 764.)

Should the sovereign state of Washington be placed in a poorer position with respect to making reasonable charges for the services or privileges it furnishes than private individuals within its borders who also furnish services and privileges and make a charge therefor to

persons engaged in and receiving their entire incomes from interstate commerce? Does one charge *burden* that commerce more or less than the other? Does not the determination of the merits of such distinctions rest with the Congress of the United States, which has been given the power to regulate interstate commerce by Article I, section 8, United States Constitution, a power which the ingenuous peruser of decisions of the United States Supreme Court, prior to 1938, might well have assumed had been delegated to the court?

b. There is no suggestion of discrimination in the application of the tax to the privilege of doing business as a stevedoring company. The tax applies to all persons engaging in all businesses. If the tax is held not to apply, then a purely local business, sharing the benefits of local government, receives a discrimination in its favor, relief from a tax burden borne by all other local business men. In the state of Washington this unfair result obtains with respect to stevedoring companies (*Puget Sound* case, *supra*) and local broadcasting companies (*Fisher's Blend Station, Inc. v. Tax Commission et al.* ('36), 297 U. S. 650, 56 Sup. Ct. 608, reversing and remanding 182 Wash. 163, 45 Pac. 2d 942, 49 Pac. 2d 1151). This type of actual discrimination against intrastate commerce should give the court fully as much concern as it has given to possible discrimination against interstate commerce.

c. There is no possibility of any duplication of the tax sought to be imposed. The stevedoring company only does business locally. The goods it handles move in

interstate commerce, not the company. No other state can possibly require a tax from the stevedoring company for the privilege of doing business in the state of Washington. Certainly no other state has ever attempted to charge the Puget Sound Stevedoring Company a tax based on receipts from business done in this state.

CONCLUSION

The *Puget Sound Stevedoring* case, *supra*, should be overruled because:

1. The imposition of the tax has merely an incidental or consequential effect on increasing the cost of doing an interstate business to shippers generally and this is not sufficient to relieve the stevedoring company from its just share of a state tax burden (*Western Live Stock v. Bureau, supra*).

2. Imposition of the tax does not discriminate against interstate commerce. The granting of an exemption to the stevedoring company creates a discrimination against those other local businesses which are carrying their fair share of the burdens of local government.

3. The imposition of Washington's business and occupation tax upon the stevedoring company measured by its receipts for carrying on local activities with respect to freight moving in interstate commerce, cannot be duplicated by any other jurisdiction with respect to the same activity.

It follows, with the overruling of the *Puget Sound* case, *supra*, that the order and judgment of the Supreme Court of the State of New York in the cases at bar should be reversed and tax liability of the respondents confirmed.

Respectfully submitted,

SMITH TROY,
Attorney General of the State of Washington,
JESS N. ROSENBERG,
Assistant Attorney General, State of Washington.
Attorneys for State of Washington.